Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

DIANA VAZQUEZ-VALENTIN,
Petitioner

v.

VICTOR J. SANTIAGO-DIAZ, in his personal capacity and as Mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGROS DELGADO-ORTIZ, in her personal capacity and as Human Resources Director of the Municipality of Toa Baja,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the appellate court erred by ordering the parties, after remand, to file supplemental briefs on three additional alleged errors presented by respondents in their original appellant's brief, but not decided upon by the appellate court; instead of following this Honorable Court's limited remand in No. 04-1322, related to *Unitherm Food Systems, Inc. v. Swift-Eckrich Inc.*, 546 U.S. ____ (2006).

B. Whether the appellate court erred by finding reversible error in the district court's exclusion of certain documentary evidence, under Fed. R. Evid. 403, and remanding the case to the district court for further proceedings.

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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Diana Vazquez-Valentin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals appears in *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d 144 (1st Cir. 2006) (Appendix 1a-26a).

JURISDICTION

The Court of Appeals entered its judgment on August 22, 2006. (Appendix 27a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT

On May 14, 2002, after nine days of jury trial, the jury returned a verdict in favor of plaintiff Diana Vazquez-Valentin, petitioner herein, and against all defendants, respondents herein, for claims based on political discrimination and constructive discharge under the First Amendment of the United States Constitution and 42 U.S.C. § 1983. On that same date the district court issued its judgment pursuant to the jury verdict.

Defendants appealed the case to the First Circuit Court of Appeals on November 3, 2003, raising the issue of the insufficiency of the evidence to withstand a motion as a matter of law, and three other alleged errors: (1) the district court's evidentiary rulings, (2) the district court's order for reinstatement of plaintiff, and (3) qualified immunity. On September 22, 2004, the appellate court issued a decision vacating the judgment of the district court and ordering it to enter judgment for the defendants. *Vazquez-Valentin v. Santiago-Diaz*, 385 F.3d 23 (1st Cir. 2004). The court of appeals stated in that decision that although defendants had failed to renew their motion under Rule 50 after the jury verdict, to preserve for appeal the district court's denial of said motion, nevertheless, it was invoking its authority to assess the sufficiency of the evidence in the case.

Plaintiff-appellee Vazquez-Valentin filed a petition for rehearing or for rehearing en banc citing this Honorable

Court's precedent *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), and, in addition, citing First Circuit political discrimination cases where similar evidence had been found to constitute First Amendment political discrimination violations; however, the petition was denied on November 17, 2004.

Ms. Vazquez-Valentin filed a petition for a writ of certiorari, No. 04-1322, which this Honorable Court granted on February 21, 2006, vacating the judgment and remanding the case to the court of appeals for further consideration in light of *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. ____ , 126 S.Ct. 980, 163 L.Ed.2d 974 (2006). Appendix 28a. *Vazquez-Valentin v. Santiago-Diaz*, __U.S. __, 126 S.Ct. 1329, 164 L.Ed.2d 43 (2006).

On March 28, 2006, after the remand, the court of appeals ordered the parties to file supplemental briefs on the three alleged errors of the appellant's brief not decided by

them originally, since they had concentrated on a fourth alleged error regarding the insufficiency of the evidence of political discrimination. Appendix 29a.

Ms. Vazquez-Valentin moved for a stay and reconsideration from the appellate court, requesting it to follow this Court's mandate and to limit itself to the *Unitherm Rule* 50 (b) issue, but the appellate court declined to stay and reconsider and a petition for a writ of mandamus or prohibition was filed with this Court: *In re Diana Vazquez-Valentin*, No. 05-1390.

On August 22, 2006, the court of appeals decided again to vacate the jury's verdict in favor of Ms. Vazquez-Valentin and to remand the case to the district court for further proceedings consistent with their opinion. *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d 144 (1st Cir. 2006). Appendix 1a-26a.

On October 2, 2006, this Court denied the petition for mandamus or prohibition. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

Petitioner requests from this Honorable Court to grant her petition for a writ of certiorari pursuant to Rule 10 (c) of the Rules of this Court, because there are special and important reasons; to wit:

A. The Scope of the Supreme Court's Mandate on Remand.

The Court of Appeals for the First Circuit did not comply with this Honorable Court's mandate and, on its own, the court ordered the parties to file supplemental briefs addressing the three alleged errors discussed by respondents in their original appellant's brief, but not decided upon by the appellate court in their original decision, since the court had focused on the insufficiency of the evidence alleged error. See

Vazquez-Valentin v. Santiago-Diaz, 459 F.3d at 147; Appendix 3a.

This order by the appellate court forces the parties to engage in repetitive litigation followed by additional appeals, wasting more resources, time and money, and it causes a delay in the solution of the case at hand, which is contrary to the judicial policy. See Rule 1 of the Federal Rules of Civil Procedure for the just, speedy, and inexpensive determination of every civil action.

For example, in footnote 5 of its decision, the appellate court states that it does not need to discuss the two other alleged errors, since it is deciding the matter on the evidentiary ruling issue. *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d at 153, n.5. Should the appellate court be revoked on the evidentiary ruling issue then, and if the case is remanded, the court could review any of these two other alleged errors, and so on. As Justiniano the Roman scholar

said "Delayed justice is not justice at all".

This petition for certiorari gives this Honorable Court the opportunity to establish a clear policy regarding this distinction between a general and a limited remand. Since, at present, there seems to be a vacuum regarding this issue. The Bar and the Circuits will benefit if this Honorable Court issues the certiorari. We have to be candid with this Honorable Court and confess that it took us by surprise when the First Circuit did not follow the specific mandate issued by this Court in February 21, 2006. For us the mandate is a specific and a limited one and it gives unambiguous instructions to the lower court. It says as follows: "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the First Circuit, for further consideration in light of *Unitherm Food Sys. v. Swift-Eckrich*, 546

U.S.____2006." Appendix 28a. As we can see the First Circuit was limited to follow the specific instructions of the mandate, but instead, it went ahead and *motu propio* decided to go into other matters not included in the mandate. We take the position that such mandate was not a general one, but a limited one. According to Black's Law Dictionary, 7th Edition, at page 973, the Mandate Rule is defined as follows: "The doctrine that, after an appellate court has remanded a case to a lower court, the lower court must follow the decision that the appellate court has made in the case unless new evidence or an intervening change in the law dictates a different result." Corpus Juris Secundum, edition 1948, at Volume 55, page 660, defines Mandate, in relation to a superior court and an inferior court, as follows: "It is a judicial command or precept issued by a court or magistrate, directing the proper officer to enforce a judgment, sentence,

.r decree, and there must not only be an order judicially given, but in order to be a mandate such order must go to an administrative officer, as a sheriff or coroner, who under it, is to perform some act carrying out a decree or judgment."

In view of the above definition it is clear then, that the First Circuit did not follow the mandate of this Honorable Court. The result of such judicial action is to compel Ms. Vazquez-Valentin to be litigating for many years, issue by issue, little by little, wich is against the judicial policy concerning civil litigation of a just, speedy, and inexpensive determination. We say this because the appellate court in its opinion stated the following, at page 148: "In our 2004 decision, we did not reach the merits of several defendants' arguments for a new trial because we focused instead on the sufficiency of the evidence. In fact, we noted that we had doubts about the court's evidentiary rulings but we did 'not have to decide the issue.' *Vazquez I*,

385 F.3d at 25 n. 1." Then it adds, "In light of the remand from the Supreme Court, we most now address the rulings that prompted such doubts".

Vazquez-Valentin v. Santiago-Diaz, 459 F.3d at 148. Appendix 6a. It is troublesome to follow such line of thought because this Honorable Court did not mandate the First Circuit to use its doubts as a basis to analyze the three other errors raised by the appellants. Therefore, the circuit court went beyond the mandate issued by this Honorable Court.

B. The Evidentiary Ruling.

The court of appeals vacated the jury's verdict and remanded the case for a new trial because the district court excluded hearsay documents by the Comptroller of Puerto Rico (an audit report) and by another Commonwealth agency know as OCALARH (The Central Labor Office for Human Resources of The Commonwealth of Puerto Rico), that had examined the Municipality's personnel practices and had

found them deficient and/or illegal in certain respects. The appellate court concluded that (1) the Commonwealth documents were wrongly excluded because they were not hearsay, since they were not offered to prove the truth of the matter asserted (Fed. R. Evid. 801(c)), and that (2) the district court's contention that the Comptroller's audit report could be unfairly prejudicial to Ms. Vazquez-Valentin, because it did not address her specific situation and, thus, was excludable under F. R. Evid. 403, was erroneous, because the offending statements could have been redacted instead of excluding the whole audit report. However, it should be pointed out that the defendants did not request to the district court that such literary surgery be done.

The appellate court correctly asserted that the crux of the matter was for the jury to determine whether the defendants had demoted Ms. Vazquez-Valentin as a result of her political affiliation, or for some other reason. *Vazquez-*

Valentin v. Santiago-Diaz, 459 F.3d at 151. Appendix 16a-17a.

We submit that the jury already found that Ms. Vazquez-Valentin was demoted because of her political affiliation and not for some other reason, and to this effect we offered plenty of evidence at trial both direct and circumstantial. See *Acevedo-Diaz v. Aponte*, 1 F.3d 62 (1st Cir. 1993), where the appellate court found political discrimination against six plaintiffs with situations, some very similar, and some exactly, like Ms. Vazquez-Valentin's situation at the Municipality of Toa Baja.

However, in our case the appellate court reasoned that the jury could not find the "some other reason", because they had no access to the Comptroller's audit report and the Commonwealth agency's letters. Specifically, the court stated:

"First, the district court did not allow the jury to know that the audit report had contained the admonition that '[f]ailure to heed a recommendation in an audit report from this Office, without just cause, may constitute a violation of [Puerto Rico law].' Second, the court's summary of the letter to Delgado did not let the jury know that the Commonwealth had recommended 'reclassifying [the affected employees] into positions for which they meet the requirements in accordance with the 1991 plan,' which is precisely the course the defendants claimed that they took in regard to Vazquez. Indeed, the district court's summary of the letter did not even let the jury know that the Commonwealth had advised the defendants to reclassify employees at all."

Vazquez-Valentin v. Santiago-Diaz, 459 F.3d at 153. Appendix 22a-23a.

We submit that these two alleged omissions were not harmful errors and, therefore, were inconsequential as to the jury's finding of political discrimination. In Ms. Vazquez-Valentin's case the district court had already examined the audit report and found that it did not apply to her particular situation ("...the Court finds difficulty in permitting the document into evidence because of the prejudicial nature of the document against plaintiff herself. That is to say, that the

document cannot be taken for the truth for which it purports to represent. The report does not speak about plaintiff or about any of plaintiff's promotions." Jury Trial transcript, page 551) and, second, there was plenty of testimonial and documentary evidence presented at trial to the effect that Ms. Vazquez-Valentin qualified by education and by experience to the position of Executive Director II under the 1991 plan and under the 1997 plan, so she did not have to be demoted to Office Worker Typist I, the position that she occupied in 1989, four years after she started to work at the Municipality of Toa Baja, Puerto Rico. It was for the jury to find that her demotion to Office Worker Typist I, the post she had held more than 12 years before, was politically motivated in violation of her First Amendment rights. Also, it was for the

jury to make the proper inferences according to the evidence.[1]

Furthermore, the parties made a stipulation regarding the audit report which was read to the jury and cited by the appellate court in its decision. *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d at 152. Appendix 19a. The appellate court did not cite the last part of the stipulation and charge to the jury which reads: "...that is to say, that you the jury, may take this statement only in connection with defendant's allegation that the statement, and not political affiliation, was the impetus for the municipality's investigation." Jury Trial transcript, page 552. The district court continued: "any law stated within the report may be utilized in the final instruction as to the jury. Jury Trial transcript, page 552. In

[1] The evidence on record shows that Ms. Vazquez-Valentin started to work at the Municipality of Toa Baja in 1985 when she was in High School, but she went up the ladder improving herself educationally and when she was appointed Executive Director she already had a college degree.

other words, defendants could have requested the jury instruction regarding the Puerto Rico law about the failure to heed a recommendation in a Comptroller's audit report, but defendants did not request such a jury instruction. On the other hand, defendants introduced evidence, both testimonial and documentary, during the trial, trying to prove that Ms. Vazquez-Valentin's demotion and constructive discharge was done not for political motive. Of course, the Comptroller's audit report at no time mentioned Ms. Vazquez-Valentin's specific situation. The report dealt only with other employees of the Municipality that were relatives of the prior Mayor, or employees with salaries and positions that received raises without meeting the job requirements.

Likewise, the jury was told many times during the trial and at the charge that plaintiff's demotion was based on a plan to reorganize the working positions within the Municipality, because of the Comptroller's conclusion about

the irregularities and the illegal appointment of many employees and the illegal pay raises, and not because of political motivation. *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d at 152. Appendix 21a.

In addition to what we have explained above, it is clear that defendants adopted the proposed stipulation offered by the appellate court. Therefore, we submit that defendants waived any objection to the paragraphs the court read to the jury. We repeat, what the court read to the jury was the paragraph stipulated by the parties during trial. That is, facing the ruling of the district court that the Comptroller's audit report and a letter from OCALARH were hearsay, and that under Rule 403 of the Federal Rules of Evidence the court had discretion to deny documents that could otherwise be admissible, defendants then agreed to the proposed stipulation offered by the district court. Defendants had the choice of not accepting the proposed stipulation. We

have to clarify what Honorable Circuit Court Judge Lipez, says at page 152 of the opinion. He says that the "district court told the jury" what appears in such pages 152 and 153. Appendix 19a and 20a. Actually, what the court was telling the jury was informing them of the stipulation reached by the parties. They were not "statements" by the district court as Honorable Judge Lipez described them. They were the text of the stipulation agreed between the parties.

We submit that if the district court committed error in the exclusion of these documents, the error was harmless, since there was enough evidence of political discrimination for the jury to have decided as it did.

Very respectfully, we have to take exception to the comments of Honorable Judge Lipez when he at page 154 (Appendix 26a) of his opinion cited the case of *Lugo vs. Toa Baja*, 329 F.Supp.2d 221 (D.P.R. 2004) and said: "In *Lugo*, which reached trial after our decision in *Gomez*, the district

court appropriately allowed in evidence the same documents that it excluded in this case. Presumably in light of that evidence, the district court concluded that the defendants in *Lugo* (the same defendants as here) were entitled to qualified immunity. The documents that we discussed above clearly are relevant to the qualified immunity analysis and should be evaluated by the district court when it considers that issue again." *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d at 154. Appendix 26a. We take exception because in our case defendants stipulated with plaintiff the paragraphs that the district court judge read to the jury. And, also, our case went all the way through 9 days of jury trial where testimonial and documentary evidence went to the jury. In addition to that, Honorable Judge Pieras decided the *Lugo* case at the summary judgment stage, while Ms. Vazquez-Valentin's case was decided on the merits after a long trial. Also, if you read the *Lugo* case you will find out that the partie s

stipulated the audit report of the Comptroller while in our case we opposed its admissibility during trial because of hearsay and due to Rule 403 of the Federal Rules of Evidence. In addition to the Comptroller's audit report, in *Lugo* all the letters from OCAP and OCALARH were also stipulated by the parties, contrary to what took place in Ms. Vazquez-Valentin's case.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the petition for a writ of certiorari should be granted and the judgment below reversed.

RESPECTFULLY SUBMITTED.

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APPENDIX

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C. DECISION OF THE U.S. SUPREME COURT IN No. 04-1322 ..... 28a

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United States Court of Appeals
For the First Circuit

No. 03-1949

DIANA VAZQUEZ-VALENTIN,
Plaintiff, Appellee,

v.

VICTOR J. SANTIAGO-DIAZ, Individually and as Mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGROS DELGADO-ORTIZ, Individually and as Human Resources Director of Toa Baja,
Defendants, Appellants.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before

Toruella, Lynch, and Lipez,
Circuit Judges.

Salvador J. Anttonetti-Stutts, Solicitor General, Mariana Negrón-Vargas and Maite D. Oronoz-Rpdríquez, Deputy Solicitors General, and Susana I. Peñagarícano-Brown, Assistant Solicitor General, on supplemental brief for appellants in their individual capacities.

Jesus M. Hernández- Sánchez and Guillermo A. Macari-Grillo on supplemental brief for appellee.

August 22, 2006

LIPEZ, Circuit Judge. In Vázquez- Valentín v. Santiago Díaz, 385 F. 3d 23 (1st Cir. 2004) (Vázquez I), we reversed a jury's verdict that Diana Vázquez – Valentín (Vázquez) had been subjected to political discrimination by her former employers, the municipality of Toa Baja and its mayor and human resources director. We reviewed the denial of the defendants' Rule 50(a) motion for judgment as a matter of law based on the sufficiency of the evidence, despite the defendants' failure to preserve that ground of appeal pursuant to Fedg. R. Civ. P. 50(b).[1] Vázquez petitioned for certiorari. After its decision in Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. ct. 980 (2006), the Supreme Court granted Vázquez's petition for certiorari, vacated our 2004 decision, and remanded

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[1] During a jury trial under the federal rules, a party may move during trial and/or at the conclusion of the evidence for judgment as a matter of law. Fed R. Civ. P. 50(a). if the district court denies a Rule 50(a) motion made at the close of all the evidence, the party may submit a "renewed" motion, under Rule 50 (b), after the jury returns its verdict. See also Proposed Amendment to Rule 50, Subdivisions (a) and (b) , effective December 1, 2006, absent contrary Congressional action, Advisory Committee Notes ("Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence.') In addition to not filing a Rule 50(b) motion, the defendants also did not address the sufficiency or weight of the evidence in a motion for a new trial pursuant to Rule 59.

the case to us for reconsideration. See Vázquez-Valentín v. Santiago-Díaz, 126 S. Ct. 1329 (2006). Unitherm established that a party "may not challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50(a) motion" alone. Unitherm, 126 S. Ct. at 988.

Upon reconsideration, we conclude that the jury's verdict in favor of Vazquez must now be vacated because of the district court's exclusion of certain evidence presented by the defendants ---a point argued by the defendants in Vázquez I but not decided by us because of our focus on the sufficiency of the evidence. Our decision to vacate on this ground also requires that we remand this case for further proceedings in the district court.

I.

After the Supreme Court's remand, we instructed the parties to brief " the following three issues addressed in the original appellate briefs: (1) the district court's evidentiary rulings, (2) the district court's order that the plaintiff be reinstated, and (3) the qualified immunity issue." Despite our instruction , the parties used much of their supplemental briefing to

argue about the scope of the Supreme Court's remanded order and of the applicability of the Unitherm decision to this case. Vázquez argues that we have to reinstate the jury's verdict in her favor in light of the Supreme Court's decision. The defendants argue that we may still order judgment as a matter of law in their favor, on sufficiency of the evidence grounds. We pause briefly to explain that the parties have misunderstood the significance of the Supreme Court's remand order.

The complete text of the Supreme Court's order in this case is as follows:

> The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of Unitherm Food Sys. v. Swift Eckrich, 546 U.S. ___(2006).

Supreme Court orders of this type, colloquially termed " GVRs," meaning "granted, vacated and remanded," do not resolve a case. See Gonzalez v. justices of the Municipal Court of Boston, 420 F. 3d5, 7 (1st Cir. 2005). Rather, they tell us that we misapprehended the law

when we entered the judgment now vacated, and that we must reconsider the case now remanded to us in light of the Supreme Court's opinion. Id. Sometimes, despite the intervening precedent, we will enter the same judgment because, after due consideration, we conclude that the new precedent does not require a different outcome. See, e.g., United States v Burnette, 423 F.3d 22 (1st Cir. 2005). Other times, the intervening precedent will result in a different outcome.

Here, the Supreme Court's decision in Unitherm does not permit us to conclude once again that a judgment must be entered for the defendants because of the insufficiency of Vázquez's evidence. Under Unitherm, we cannot review the denial of a Rule 50 (a) motion based on the sufficiency of the evidences when the party appealing the verdict failed to renew its sufficiency challenge in the district court pursuant to Rule 50 (b). See Unitherm, 126 S. Ct. at 987 ("[A] party's Rule 50 (a) motion. . . cannot be appealed unless that motion is renewed pursuant to rule 50 (b).").

Vázquez is equally wrong in arguing that we must reinstate the jury's verdict. In our 2004 decision,

we did not reach the merits of several defendants' arguments for a new trial because we focused instead on the sufficiency of the evidence. In fact, we noted that we had doubts about the district court's evidentiary rulings but we did "not have to decide the issue." Vázquez I, 385 F. 3d at 25 n.1. In light of the remand from the Supreme Court, we must now address the rulings that prompted those doubts. See Gonzalez, 420 F. 3d at 8. [2]

II.

We recited the facts at length in Vázquez I., 385 F.3d at 23-29. We incorporate those facts by reference, summarizing only briefly the details most pertinent to our discussion here.[3] Vázquez claimed that she was demoted as a result of the defendants' animus against

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[2] Unitherm does not mean that a party has to file a post verdict motion in order to preserve an evidentiary objection for appeal. Unitherm does not change the rule "that once the district court 'makes a definitive ruling on the record admitting. . . evidence, either at or before trial, a party need not renew an objection. . . to preserve a claim of error for appeal.' " Zachar v. Lee, 363 F.3d 70, 75 (1st Cir. 2004) (quoting Fed. R. Evid. 103 (a) (2)). See also Wright & Graham, fFederal Practice and Procedure: Evidence 2d ss 5032-5034.

[3] To be clear, we do not rely on the vacated legal conclusions in Vazquez I for our decision here.

her political affiliation. The defendants, members of the municipal administration of Toa Baja that took charge in January 2001, claimed that she was demoted because the previous municipal administration had promoted her illegally and the Commonwealth of Puerto Rico had mandated corrective action.

In support of this defense, the defendants, invoked an audit of municipal personnel practices that the Controller of Puerto Rio had compieted during the last months of the previous administration. See Vázquez I., 385 F. 3d at 25 n.1. The audit reveled that Toa Baja had run afoul of numerous Commonwealth laws relating to the appointment and promotion of municipal employees. Under Puerto Rico law, "all municipal jobs are governed by so-called job classification plans that are adopted locally. These plans set forth the occupational groups and personnel structure of the municipality, including the primary responsibilities and employment requirements for each position in city government." Vázquez I, 385 F. 3d at 26. These job classification plans generally must be approved by the Commonwealth of Puerto Rico before they can be implemented. Once a job classification

plan has been approved, municipalities normally must use a merit system to fill the career positions the plan creates. See Gonzalez-De-Blasini v. Family Dept., 377 F.3d 81, 86 (1st Cir. 2004). "Under this system, career employees must, among other requirements, pass a competitive examination to be eligible for appointment or promotion to a career position," Id.

According to the Comptroller's audit report, Toa Baja had adhered neither to the requirement that it submit its job classification plans to the Commonwealth for approval, nor the requirement that it use a merit system to fill jobs and make promotions. The municipality's main structural violations were its use of an unapproved 1997 job classification plan (Toa Baja's most recent properly-approved plan dated from 1991) and its habit of ignoring the normal merit-based appointment system in favor of a system by which relatives and allies of the mayor routinely received desirable posts.

Under Puerto Rico law, personnel appointments made in violation of Commonwealth laws and regulations normally "are null and void ab initio." Gonzalez-De-Blasini, 377 F.3d at 86 (internal quotation

marks (omitted). Accordingly, the Controller's audit report "recommended" that the municipality take corrective action to undo any illegal personnel actions. The same report warned that "[f]ailure to heed a recommendation in an audit report from this Office, without just cause, may constitute a violation of [Puerto Rico law]."

In reaction to the audit report, the outgoing municipal administration began reviewing personnel files and, according to a letter it sent to Commonwealth officials, "encountered causes of employees that did not meet the requirements of their position." Commonwealth officials responded that these employees would "need to be re-routed to a classification for which they meet the requirements." Before any reclassification took place, the November 2000 election happened, and the previous administration—the one responsible for the violations cited by the audit report—was replaced by an administration headed by the defendant mayor.

Upon taking office, the defendants made several inquiries to Commonwealth officials about the audit report and its recommendations. In particular, the

defendants asked whether all employee appointments pursuant to the municipality's 1997 personnel plan, which had not been properly approved, would have to be rescinded. The Commonwealth's answer was that "the 1997 plans have no validity" so "we recommended [] the alternative of reclassifying [the affected employees] into positions for which they meet the requirements in accordance with the 1991 plan." In light of this guidance, the new administration adopted corrective action plan that called for a thorough review of personnel files and reassignment of any improperly-promoted employees.

The resulting reviews and reclassification had a large effect on municipal employees. As we noted in Vázquez I., by the time of the trial, "around six hundred files had been evaluated." 385 F. 3d at 26. This number represented slightly less than half of the municipality's workforce. Of those employees whose files had been evaluated, roughly "had sought an informal hearing regarding the personnel action that resulted from the review." Id. Vázquez was one of the many employees who was reclassified as a result of the new administration's review and who sought a hearing.

Vázquez started working for Toa Baja while a college student in 1985, as a "transitory" office clerk. She was appointed to the career position of "Office Worker / Typist I in 1989. She held that post until the summer of 1993, when she was elevated to "Secretary III." Less than two months later, she was promoted again to "Assistant Director." The post "Assistant Director" was later renamed "Executive Director II," the position Vázquez held when the new administration took office. See Vázquez I, 385 F.3d at 28. When the defendants reviewed Vázquez's personnel records, they decided that both of her 1993 promotions had been in violation of the 1991 plan. Specifically, the defendants later explained to Vázquez that her promotion from "Office Worker / Typist I" to "Secretary III" had been improper because she had not had the required courses in business skills or typing and because she had not spent the required year as a "Secretary II" or equivalent. Her second promotion, they said, was improper for want of the required experience and because it had occurred so soon after the previous promotion. In the spring of 2001, the defendants informed Vázquez that the illegality of her

1993 promotions meant the she would have to be demoted to the position of "Office Worker / Typist I," the same post that she had assume in 1989. That job had no supervisory responsibilities and paid less than half as much as her "Executive Director II" position.

Vázquez protested that she was a college graduate with many years of experience in municipal government, and that her college transcript clearly showed that she had taken a typewriting and shorthand courses. (Apparently, the transcript was not in her personnel file). When she learned that she would be demoted despite her educational credentials and experience, Vázquez asked for and was granted a hearing before an administrative hear in officer. Vázquez later testified that the hearing lasted about five minutes. The hearing officer determined in a written decision that Vázquez had been hired and promoted illegally. Shortly after her demotion became effective, Vázquez resigned her new position. Suspecting that the true reason for her demotion was her political affiliation with the party that had lost the 2000 election, she timely filed this case alleging political discrimination.

III.

At the trial in April and May 2002, to demonstrate that they had acted in good faith in demoting Vázquez the defendants sought to introduce as evidence the Controller's audit and the communications between the municipal administration and Commonwealth officials that followed. The defendants made these efforts during the testimony of their two principal witnesses, defendant Milagros Delgado-Ortiz (Delgado, who was the new administration's human resources director, and the defendant mayor, Victor Santiago-Díaz (Díaz). During Delgado's testimony, the defendants attempted to introduce the audit report itself and a four-page letter to her from the Commonwealth Office of Municipal Affairs explaining that the 1997 personnel plan was invalid. The defendants also attempted to have Delgado testify as to the contents of these documents. During Diaz's testimony, the defendants attempted to introduce a letter Diaz sent to Commonwealth officials asking what the municipality should do in light of their earlier documents, and two letters from the Commonwealth in response, giving the advice that the municipality should

reclassify its employees. Alternatively, the defendants sought to have Diaz testify about these letters.

The district court excluded all of this proffered evidence on two grounds. The district court cited the hearsay rule and also noted generally that it did not want to expose the jury to the legal conclusion in the documents. Referring specifically to the letter from the Commonwealth officials to Delgado, the district court stated that the document "is a conclusion of law and is hearsay [and] for this reason [] cannot be admitted as evidence." The district court also expressed concern that the audit report could be unfairly prejudicial to Vázquez because it contained many statements that did not pertain to her appointment specifically. See Fed. R. Evid. 403. On appeal, Vázquez echoes these rationales, which are unpersuasive.

As the defendants point out, the excluded documents were not hearsay because they were not "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801 (c); see also Ramírez-Rodriguez v. Boehringer Ingelheim Pharmaceuticals,

Inc., 425 F. 3d 67, 76-77 (1st Cir. 2005). We indicated as much in Vázquez I: "The exclusion of these documents as hearsay is troubling. So crucial to the defendants' case, and offered as an explanation for the personnel actions undertaken by the defendants rather than for the truth of the personnel irregularities described in the documents, these documents are not hearsay, and they were highly relevant. Their exclusion might well have justified a new trial."385 F.3d at 25 n.l. The "matters asserted" in the documents were that many Toa Baja employees had been hired without due regard for procedures, that the Mayor and his administration would be liable under the Commonwealth's ethics laws if they did not take measures to remedy the hiring abuses of the previous administration, and that the approach of reviewing personnel files and reclassifying employees was

consistent with the Commonwealth's guidance. The defendants "offer[ed] these assertions to explain the basis for [their] decision to [demote Vázquez]." Ramirez- Rodriguez, 425 F.3d at 77. The issue at trial was not weather Vázquez was appointed properly or weather the new administration was legally liable for the abuses of its predecessors. Rather, the issue for the jury was weather the defendants had demoted Vázquez as a result of her political affiliation, or for some other reason. "In short, the documents were not offered to prove" that the new administration was legally obligated to demote Vázquez, "but rather to demonstrate that [h]er superiors had reason, based on a thorough investigation, to believe that [they were required to demote her]." Id. Accordingly, the documents were not hearsay. The suggestion that the documents were inadmissible legal opinions fails for

similar reasons. The documents did contain legal conclusions about the propriety of the previous municipal administration's personnel decisions. But this is not a case about the propriety of Vázquez's appointment. [4] The critical issue in this case – the ultimate issue for the jury – was determining the defendants' motivations for demoting Vázquez. The documents offered no legal conclusions about those motivations. Rather, they described a neutral evaluation of the municipality's personnel policies that, if truly relief upon, provided a non-discriminatory basis for Vázquez's demotion. As we explained in a case involving a similar situation, while the documents were "not admissible for the purpose of proving what

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[4] Vázquez's due process claim, which the district court dismissed on the defendants' Rule 50 (a) motion, after the presentation of evidence but before the case went to the jury, also did not hinge on the propriety of her appointment. As the district court noted, Vázquez's claim was "based upon the theory that [her pre-demotion] hearing was previously determined and was in and of itself a sham."

obligations the law imposed upon the Mayor, [they were] admissible to show that the Mayor's understanding at the time and his ensuing state of mind." Gómez v. Rivera Rodríguez, 344 F. 3d 103, 115 (1st Cir. 2003).

Gómez also refutes Vázquez's suggestion that the documents could have been excluded, in toto, pursuant to rule 403. In Gómez we noted that:

> The rule 403 balancing test applies statement by statement. See Kassel v. Gannett Co., 875 F.2d 935, 952 (1st Cir. 1989) (noting that the trial court "must balance the prejudicial effect and probative value of each statement offered"). To use the rule as an instrument for the wholesale exclusion of a percipient witness's testimony would be tantamount to allowing the presider to cut down the entire tree out of rear that some of the fruit might prove rotten. Rule 403 requires more delicate pruning of evidentiary proffers. See id. (warning against throwing "out the baby with the bath water").

Id. At 115 (footnote omitted); see also id. At 115 n.7 ("[t]he need to limit the jury's use of certain testimony does not give the trial court carte blanche to exclude it entirely."). Here, there would be a similar calculus. If, as the district court suggested, there was some material in the audit report that was unfairly prejudicial to Vázquez, the remedy should have been to redact the offending statements from the jury's view, not to exclude the document entirely.

Anticipating the possible rejection of her arguments, Vázquez asserts that any error in excluding the documents was not prejudicial to the defendants given other material that was admitted in evidence. She points particularly to the statements that the district court read to the jury summarizing some of the excluded material. After refusing to let Delgado testify as to the contents of the audit report, the district court told the jury that;

> The Comptroller of the Commonwealth of Puerto Rico performed an audit in which his staff examined a sample of personnel files. The report stated that certain irregularities in the placement of some employees for the Municipality of Toa Baja had been found. The report should

> not be taken as evidence of the truth or veracity of the statement found therein, but rather only that the report was made.

In regard to the letter to Delgado about the illegality of the 1997 personnel plan, the district court told the jury that:

> Mrs. Delgado sought advice from [the Commonwealth]. Mrs. Delgado received a letter in reply to this petition for advice. The letter received by Mrs. Delgado is evidence only that she sought and received advice. The letter in no way proves that the advice she received was true or legal.

The district court also told the jury, as part of its charge, that:

> ...according to the defendant, plaintiff's demotion was based on legitimate policy and administrative consideration devoid of any political motivation. The contend that their demotion was a direct result of the implementation of a plan to reorganize the working positions within the municipality. Defendants further claim that the Comptroller of Puerto Rico concluded that the municipality's previous administration had illegally appointed many employees and had illegally raised the compensation of others.

Finally, Vázquez points out that during cross-examination of her own testimony, the defendant persuaded the district court that Vázquez should read to the jury a letter the defendants had sent her after she submitted her resignation. The letter stated:

> I wish to clarify that the undertakings being carried out by this municipality with respect to personnel transactions are due to the findings made by the Comptroller of Puerto Rico in his audit report [ ] and the corrective action plan, which we are required to submit to said office, correcting the findings of irregularities in the proceedings involving appointment and selection of personnel.

Although these statement by the court and the admission of this letter reflect a laudable attempt by the court to be fair to all parties, they were not enough to render the exclusions by the court inconsequential. The court's third statement and the letter to Vázquez merely paraphrase the defendants' position at trial. They did nothing to show that the Commonwealth

authorities had in fact given the legal opinions in question. The district court's summaries of the audit and one letter also failed to put the jury on notice of the contents of the excluded documents. First, the district court did not allow the jury to know that the audit report had contained the admonition that "[f]ailure to heed a recommendation in audit report from this Office, without just cause, may constitute a violation of [Puerto Rico law]." Second, the court's summary of the letter to Delgado did not let the jury know that the Commonwealth had recommended "reclassifying [the affected employees] into positions for which they meet the requirements in accordance with the 1991 plan, "which is precisely the course the defendants claimed that they took in regard to Vázquez. Indeed, the district court's summary of the letter did not even let the jury know that the Commonwealth had advised the

defendants to reclassify employees at all. In short, the summaries by the court simply were insufficient to convey the seriousness with which the Commonwealth had insisted that the defendants remedy the previous administration's abuses, and the specific measures the urged the defendants to take. For these reasons, the exclusion of the documentary evidence was not harmless, and we must vacate the jury's verdict and remand for a new trial.[5]

IV.

Several times during the proceedings, the individual defendants asked the district court to rule that they were entitled to qualified immunity. They asked for summary judgment on that ground, a request that the district court denied because there were

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[5] Given this outcome, there is no need for us to discuss the defendants' contentions that the district court committed error in making certain remarks during the trial or in ordering the defendant to reinstate Vázquez as an Executive Director II.

disputed issues of fact relating to the defendants' actual motivations for Vázquez's demotion. The district court explained that the defendants would not be entitled to qualified immunity if the jury concluded that they had demoted Vázquez because of political animus. In the court's view, such a finding would establish that an objectively reasonable municipal official would not have acted as the defendants did.[6] The defendants also sough to invoke qualified immunity at trial, asking the district court to rule in their favor on that issue after Vázquez's case in chief and again at the close of the evidence. The district court

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[6] "This Court has identified a three-step process for evaluating qualified immunity claims: (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right." Wilson v. City of Boston, 421 F. 3d 45, 52-53 (1st Cir. 2005). In the district court's view, because a municipal employee's right to be free of political discrimination is a clearly-established constitutional right, only the third part of the test was at issue in this case.

reserved its decision pending the jury's findings on the defendants' motivations.

In the end, according to the verdict form, the jury found that Vázquez's "political affiliation was a substantial or a motivating factor in the decision to demoted her from her position as Executive Director II." On the basis of this finding, the district court denied the defendants' motion for qualified immunity.[7] We have now concluded that the jury verdict must be vacated because of the exclusion of evidence that the jury was entitled to hear. Given the centrality of the jury verdict to the district court's denial of qualified immunity, the district court should reexamine the qualified immunity issue as well. Indeed, we note here, as we did in Vázquez I, that the same district court judge who heard

[7] The defendants did not make any post-trial motion on the issue; the district court issued a thorough written order denying qualified immunity the same day the jury returned its verdict.

this case presided over a second political discrimination case from Toa Baja, involving the same defendants and a group of plaintiffs who brought claims similar to Vázquez's. See Lugo v. Toa Baja, 329 F. Supp. 2d 221 (D.P.R. 2004). In Lugo, which reached trial after our decision in Gómez, the district court appropriately allowed in evidence the same documents that it excluded in this case. Presumable in light of that evidence, the district court concluded that the defendants in Lugo (the same defendants as here) were entitled to qualified immunity. The documents that we discussed above clearly are relevant to the qualified immunity analysis and should be evaluated by the district court when it considers that issue again.

Judgment vacated. Remanded for further proceedings consistent with this opinion. The parties shall bear their own costs.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 03-1949

DIANA VAZQUEZ-VALENTIN,
Plaintiff, Appellee,

v.

VICTOR J. SANTIAGO-DIAZ, Individually and as Mayor of Toa Baja; MUNICIPALITY OFTOA BAJA; MILAGROS DELGADO-ORTIZ, Individually and as Human Resources Director of Toa Baja,
Defendants, Appellants.

JUDGMENT

Entered: August 22, 2006

This cause came on remand from the United States Supreme Court.

Upon consideration whereof, it is now here ordered, adjudge and decreed as follows: the judgment of the district court is vacated, and the matter is remanded for further proceedings consistent with the opinion issued this day. The parties shall bear their own costs.

By the court:

Richard Cushing Donovan, Clerk

[Certified copies to: Hon. Jaime Pieras and Mrs. Frances de Moran, Clerk, United States District Court for Puerto Rico. Copies to Mr. Hernandez-Sanchez, Mr. Macari-Grillo, Mr. Fernandez-Quiles, Ms. Aldarondo Ortiz, & Mr. Castro-O tiz.]

APPENDIX C

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 21, 2006

Mr. Jesus M. Hernandez Sanchez
P.O. Box 190222
San Juan, PR 00919-0222

Re: Diana Vazquez-Valentin v.
Victor J. Santiago-Diaz, Individually and as Mayor of Toa Baja, Puerto Rico, et al. No. 04-1322

Dear Mr. Sanchez:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the First circuit, for further consideration in light of Unitherm Food Sys. V. Swift-Eckrich, 546 U.S. _____ (2006).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

William K. Suter, Clerk

United States Court of Appeals
For the First Circuit

No. 03-1949

DIANA VAZQUEZ-VALENTIN
Plaintiff-Appellee

VICTOR J. SANTIAGO-DIAZ, In his personal capacity and as Mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGROS DELGADO-ORTIZ, In Her personal capacity and as Human Resources Director of the Municipality of Toa Baja
Defendants – Appellants

Before
Torruella, Lynch, and Lipez. Circuit Judges.

ORDER OF COURT

Entered: March 28, 2006

In light of the Supreme Court's decision in this case, the court directs the parties to submit supplemental brief not exceeding 25 pages per party, allocated as the parties see fit, among the following three issues identified in the original appellate briefs: (1) the district court's evidentiary rulings; (2) the district court's order that the plaintiff be reinstated; and (3) the qualified immunity issue. The supplemental briefs should not repeat any information contained in the original briefs. The appellants' brief shall be filed no later than twenty days from the date of this order. The appellee shall file her brief no later than twenty days after the appellants have submitted their materials. All supplemental briefing must conform to Fed. R. App. P. 32.

OPPOSITION BRIEF

(1)

No. 06-702

FILED
DEC 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DIANA VAZQUEZ-VALENTIN,

Petitioner,

v.

VÍCTOR J. SANTIAGO-DIAZ, in his personal capacity and as mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGROS DELGADO-ORTIZ, in her personal capacity and as Human Resources Director of the Municipality of Toa Baja,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

I. After this Court granted the petition in 04-1322, vacated the judgment of the United States Court of Appeals for the First Circuit, and remanded the matter to that court for further consideration in light of this Court's opinion in *Unitherm Food Systems, Inc. v. Swift-Eckridge Inc.*, 126 S.Ct. 980 (2006), did the Court of Appeals err in allowing the parties to file supplemental briefs on the other issues that had been presented by respondents-appellants in their original brief but not reached by the Court of Appeals in its first opinion and judgment?

II. Did the Court of Appeals below err in vacating the jury verdict and remanding for a new trial based on its finding that the District Court's exclusion of the documentary evidence was not harmless?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The petitioner accurately lists the parties to the proceedings. No disclosure need be provided under Rule 29.6 because Respondents Víctor J. Santiago-Díaz and Milagros Delgado-Ortiz are individual citizens and no non-governmental corporations or publicly held companies are a party to this action.

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BRIEF IN OPPOSITION

Respondents Víctor J. Santiago-Díaz ("Santiago"), as former Mayor of Toa Baja, Puerto Rico, and Milagros Delgado-Ortiz ("Delgado"), as Human Resources Director of the Municipality of Toa Baja, both in their individual capacities, hereby oppose the petition for writ of certiorari, which seeks review of the U.S. Court of Appeals' decision of August 22, 2006.

COUNTER-STATEMENT OF THE CASE

A. Introduction

Further review of the First Circuit's decision in this case is unwarranted. First, Petitioner has failed to set forth compelling reasons in order for this Court to exercise its judicial discretion and review on a writ of certiorari pursuant to Rule 10 of the Supreme Court of the United States. Second, this is the second time that Petitioner has brought before this Honorable Court the question of whether the appellate court erred in allowing the parties to supplement their original briefs: Petitioner filed a petition for writ of mandamus in Docket No. 05-1390, which was already denied by this Court.

Even though Respondents contend that Petitioner's claims are not worthy of this Court's review, given that pursuant to Rule 15(2) of this Honorable Court misstatements of fact or law must be addressed at this stage of the proceedings, Respondents have elected out of an extreme abundance of caution to briefly clarify the record and point out to the Court the deficiencies in Petitioner's statement of facts in order to avoid having any misstatement made in the petition deemed waived by the Court.

B. Background

During the trial of this political discrimination case, defendants moved twice for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), after plaintiff and defendants each finished submitting their respective cases. Both motions having been denied,[1] the case went to the jury, which returned a verdict for the plaintiff on May 14, 2002.[2] On the same day that the jury returned its verdict, the court issued an *Opinion and Order* denying defendants' motion for qualified immunity. (Individual capacity Appellants' Add. at 28-32; Docket No. 76).

As a result, Defendants filed a Rule 59 motion requesting the court to set aside the compensatory and punitive damages awards.[3] In that motion, Defendants challenged the sufficiency of the evidence underlying the jury's verdict. Plaintiff then filed her opposition.[4] Roughly one year later, on May 5, 2003, the District Court issued an *Opinion and Order* denying Defendants' Rule 59 motion, as well as granting Plaintiff's motion for reinstatement.[5] (Individual capacity Appellants' Add. at 35-40; Docket No. 99). Final Judgment followed on that same

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[1] *See* Individual capacity Appellants' Add. at 23-27; Docket No. 68. The court granted in part Defendants' Rule 50 motion dismissing Plaintiff's due process claims under the Fifth and Fourteenth Amendments. *See* Individual capacity Appellants' Add. at 26.

[2] *See* Docket No. 75.

[3] *See* Docket No. 84.

[4] *See* Docket No. 85.

[5] Plaintiff had filed a Motion for Reinstatement to her position of Executive Director II (Docket Nos. 80 and 87), and Defendants timely opposed it (Docket Nos. 82 and 88).

date. (Individual capacity Appellants' Add. at 41-43; Docket No. 100).

In their Brief on appeal, Defendants-Appellants raised the following arguments: *first*, that Plaintiff's evidence of political discrimination was insufficient to establish a *prima facie* case of political discrimination; *second*, that the district court erred by excluding certain documentary evidence that was crucial to Defendants' defense incurring in reversible error; *third*, that the presiding judge's prejudicial remarks and conduct before the jury tainted the verdict to the point of warranting a new trial; *fourth*, that the District Court abused its discretion by ordering the reinstatement of Plaintiff and; *fifth*, that the District Court erred in denying the Defendants' qualified immunity defense. *See Vázquez-Valentín v. Santiago-Díaz*, 385 F.3d 23, 29 (1st Cir. 2004). Plaintiff-Appellee contested Appellants' arguments on appeal.

On September 22, 2004, the United States Court of Appeals for the First Circuit vacated the judgment and ordered the entry of judgment for defendants, ruling that Plaintiff had failed "to adduce sufficient evidence for a jury to reasonably infer that Plaintiff's political affiliation was a substantial or motivating factor in an adverse employment action." *See Vázquez-Valentín*, 385 F.3d at 40.[6]

Plaintiff-Appellee then filed a Petition for Writ of *Certiorari* before this Court, No. 04-1322, in which she requested that the judgment below be reversed. Appellants filed the corresponding Brief in Opposition. No further briefs or motions were filed by either party.

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[6] Plaintiff-Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc before the appellate court was denied.

On February 21, 2006, this Court gvr'd the case, granting the petition for writ of *certiorari*, vacating the appellate court's judgment, and remanding the case to the First Circuit for further consideration in light of its opinion in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006), which it had just issued. *See Diana Vázquez-Valentín v. Víctor J. Santiago-Díaz*, 126 S. Ct. 980 (2006); Petitioner's Appendix C at 28a.

On March 20, 2006, Defendants-Appellants (here Respondents) Santiago and Delgado filed in the appellate court a *Notice of Disposition Above and Request to File Supplemental Brief.* On March 28, 2006, the First Circuit entered an Order whereby it directed "the parties to submit supplemental brief, [. . .] allocated as the parties see fit, among the following three issues identified in the original brief." (Petitioner's Appendix D at 29a).

Soon thereafter, on April 28, 2006, Plaintiff-Petitioner filed a *Petition for Writ of Mandamus or Prohibition* with this Honorable Court. (Docket No. 05-1390). In addition, Plaintiff-Petitioner filed a *Motion to Stay Order of Panel of the United States Court of Appeals for the First Circuit.* Petitioner argued that the court of appeals, by ordering supplemental briefing on three errors presented by Appellants in their original brief, had not complied with this Honorable Court's Mandate of February 21, 2006. On October 2, 2006, this Court denied Plaintiff's petition. *In re Diana Vázquez-Valentín*, ___ S. Ct. ___, 2006 WL 1178747 (U.S.).

On May 8, 2006, Defendants-Appellants filed their Supplemental Brief on Remand.[7] On June 5, 2006, Plaintiff-Appellee filed her Supplemental Brief on Remand. On August 22, 2006, the Court of Appeals for the First Circuit entered its decision vacating the District Court's judgment and remanding for a new trial based on documentary evidence wrongly excluded and with specific instructions to the District Court that, based on those documents wrongly excluded, it reevaluated the qualified immunity defense. (Petitioner's App. A at 23a, 26a). The present petition for writ of *certiorari* filed by Plaintiff followed.

C. Deficiencies and Omissions in Petitioner's Statement of Facts and Law

In Petitioner's statement of the facts there is an omission that should be brought to this Court's attention. In addition, the facts relating to the First Circuit's decision regarding the District Court's evidentiary ruling are misconstrued. The following are Petitioner's deficiencies and omissions:

1. In the statement of the case, the Petitioner fails to fully disclose and clarify the bases for the Court of Appeals order directing the parties to supplement the briefs. Petitioner seems to infer that the appellate court, "on its own," ordered the parties to file supplemental briefs addressing three of the five errors argued by respondents.

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[7] In their supplemental brief, Appellants respectfully requested the appellate court to examine, as additional grounds for relief, the other issues/arguments that were duly raised and preserved for appeal by them, but which were not reached by the appellate court because of its previous disposition of the sufficiency of the evidence. (Santiago and Delgado's Supplemental Brief on Remand at 18-21).

(*See* Petition for Writ at 4, 6). However, although the appellate court has the authority to do so on its own, as previously discussed, Respondents had prompted the appellate court to allow them to supplement their original brief with regards to the *Unitherm* case. Thus, the appellate court partly responded to Appellants' request. Appellants not only discussed the *Unitherm* case and how it pertained to the present case, but also further developed their qualified immunity argument, as allowed by the appellate court.

2. As to the issue of the District Court's evidentiary ruling, contrary to Petitioner's representations to this Court (Petition for Writ at 14-17), the First Circuit ruled that the exclusion of the documentary evidence was a harmful error because the audit report applied to Vázquez's particular situation; the testimonial and documentary evidence presented at trial regarding Vázquez's qualifications for the position did not support the exclusion of the documentary evidence; and the parties had never made a stipulation with regards to the audit report or any other documentary evidence. In addition, Respondents never waived the issue of the evidentiary ruling; to the contrary, from the record it can be easily ascertained that various offers of proof were made in order to duly preserve this issue for appeal. (Municipality's Brief at 13-18).

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioner's claims regarding the limited scope of the mandate on remand, as well as their flawed statements

regarding the evidentiary ruling, which excluded documents central to Defendants-Respondents defense, are unworthy of review by this Honorable Court.

I. This Honorable Court's Mandate On Remand Did Not Preclude The Appellate Court From Reviewing The Other Issues That Had Been Presented On Appeal.

Petitioner asserts that this Honorable Court's mandate precluded the appellate court from reviewing on remand the other issues raised in the appeal, but offers no case law in support of such contention. (Petition for Writ at 8-10). Based on the misleading premise that the mandate was specific and not general, Petitioner claims that the First Circuit could not deviate from the mandate and was limited to reviewing the case in light of the *Unitherm* case alone. (Petition for Writ at 8-11). Such a narrow reading of the mandate is unreasonable.[8]

This Court has previously established that "[t]he doctrine of law of the case comes into play only with respect to issues previously determined." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979). The only issue reached by

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[8] Petitioner also argued that the appellate court's order directing the parties to supplement their original briefs forced the parties to engage in repetitive litigation, wasting, thus, resource, time, and money, and causing delays, contrary to judicial policy. (Petition for Writ of Certiorari at 7; *see also* Petition for a Writ of Mandamus at 8, Docket No. 05-1390). Petitioner is not in a position to complain about unnecessary expenditures of time and effort, however, since she has not hesitated in bringing her case to this Court on three separate occasions. In any case, the First Circuit's briefing order was fully within the broad scope of its case-management discretion.

the First Circuit in its original judgment was the controversy regarding the sufficiency of the evidence. *Diana Vázquez*, 385 F.3d at 29. The Court expressly declined to address any of the other issues presented in the appeal. *Id.* This Court has also stated that "[o]n remand, the 'Circuit Court may consider and decide any matter left open by the mandate of this court.'" *Quern*, 440 U.S. at 347 n.18; *Nguyen v. United States*, 792 F.2d 1500, 1502 (1986) ("'While a mandate is controlling as to matters within its compass, on remand a lower court is free as to other issues.'") (*citing Quern*, 440 U.S. at 347 n.18; *Sprague v. Ticonic National Bank,* 307 U.S. 161, 168 (1939)).

Respondents respectfully contend that the Supreme Court's decision and/or mandate did not bar the court below from examining other issues presented, but not reached, in the case at bar. The evidentiary ruling and its disposition regarding the qualified immunity defense were within the appellate court's jurisdiction to review, particularly when those issues were duly presented to the appellate court and had not been previously considered by that court.[9] Furthermore, from a reading of the August 22, 2006 Judgment, it can be easily ascertained that the appellate court fully complied with the mandate of this Court. (Petitioner's App. A at 4a-6a).

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[9] In the first petition for writ of certiorari, No. 04-1322 (Op. Cert. at 13-14), Defendants-Respondents respectfully suggested that if this Court were to consider issuing the writ of certiorari, that the writ should not extend to the other arguments not related to the sufficiency of the evidence and raised on appeal by Appellants, given that these other issues had not been addressed by the Court of Appeals for the First Circuit because of the disposition of the sufficiency of the evidence argument.

Finally, Petitioner seems to have overlooked the fact that this Court already denied her petition for writ of mandamus touching upon this exact issue. This alone is sufficient to make the petition for writ of certiorari undeserving of review.

II. On Its Merits, The First Circuit's Decision Regarding The District Court's Evidentiary Ruling Was Correct.

The district judge excluded the Comptroller's Audit Report in its entirety (as well as all references to the document),[10] because the document constituted hearsay, and because admitting the report into evidence would be unduly prejudicial to the Plaintiff. (Petition for Writ at 14-15, 21). Plaintiff contends that the ruling, even if in error, was harmless because the report does not speak about her and that the instructions of the court, in lieu of admitting the Report, were enough. (Petition for Writ at 15, 17-18). This and Petitioner's other arguments are unconvincing. (Petition for Writ at 15-16, 18-20).

The rulings that excluded the Audit Report and other documentary evidence (such as the OCAM and OCALARH letters, among others), which were central to Respondents' defense, were not harmless errors. (Municipality's Brief at 7). *First*, Respondents never stipulated any jury instruction dealing with the exclusion of the Comptroller's Report and the other documentary evidence mentioned in Defendants-Appellants' principal brief. (Municipality's Brief at

[10] Defendants Delgado and Santiago were not allowed to testify or mention the audit report or the other excluded documentary evidence. (Municipality's Brief at 15-17).

13-18). The record does not contemplate such finding. The fact that the court made an evidentiary ruling (Municipality's Brief at 14, 16-18; *see also* Petition for Writ at 19a-21a), which Defendants-Respondents were obliged to obey until they had the opportunity to appeal the same, did not automatically convert the ruling in a stipulation.

Second, Defendants made all the pertinent offers of proof regarding all excluded documentary evidence precisely in order to preserve the issue of the evidentiary rulings for appeal. (Municipality's Brief at 13-18). Thus, there was no waiver by Defendants, contrary to what Petitioner now argues for the first time in the case; indeed, if there is waiver here, it is Petitioner's.[11]

Third, it is Respondents' position that the report and the letters do not fit the definition of hearsay. In the remote eventuality that the documents were to be deemed as hearsay, Respondents made sure to invoke one of the exceptions to the exclusionary rule – specifically, they expressly relied on Fed. R. Evid. 803(8). (Municipality's Brief at 53). "The relevancy of the report . . . was apparent." *Kassel v. Gannett Co., Inc.*, 875 F.2d 935, 946 (1st Cir. 1989); *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 175 (1988) ("statements in the form of opinions or conclusions are not by that fact excluded from the scope of [Rule 803(8)(C)]."); *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1, 8 (1st Cir. 1990) (where the Court of Appeals indicated its willingness to interpret *Rainey* broadly).

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[11] By the comments made by the district judge from the bench during trial, even he anticipated that Defendants were going to appeal his evidentiary rulings. (Municipality's Brief at 18 (top of page)).

In *Gómez v. Rivera-Rodríguez*, 344 F.3d 103, 115 (1st Cir. 2003), the First Circuit held that the trial court's mistaken exclusion of evidence, which "was admissible to show the Mayor's understanding at the time and his ensuing state of mind," in conjunction with other errors, required a new trial. The appellate court also held that the district court erred in using Rule 403 "as an instrument for the wholesale exclusion of a percipient witness's testimony." *Id.* at 115.

Last but not least, as to the allegation that Plaintiff was not mentioned in the Comptroller's Audit Report and that the *Aldarondo-Lugo v. Municipality of Toa Baja*, 329 F. Supp. 2d 221 (D.P.R. 2004) case is distinguishable from this one, Respondent must clarify that in the *Aldarondo* case, most of the 88 Plaintiffs, whose claims were dismissed on summary judgment, had also not been mentioned by name in the Comptroller's Report.[12] It is worth noting that in the *Aldarondo* case, the judge presiding the case (Judge Pieras, the same judge as in the present case) noted that the Comptroller, who prepared the report regarding the irregularities made by the former Mayor, was named by the NPP former governor, who is of the same political party as the former mayor of the Municipality, and Plaintiff in the instant case. *Aldarondo-Lugo*, 329 F. Supp. 2d at 230. Furthermore, in *Aldarondo-Lugo*, Santiago and Delgado, in their personal capacities, were granted qualified immunity as to the First Amendment claims against

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[12] The analysis made by the Comptroller as to the illegalities in the appointment process, such as the failure to follow the merit principle in appointments, covered mainly the time period of January 1, 1996 to December 31, 1998, although some prior and subsequent operations were examined. (Municipality's Brief at 8-10).

them, excluding the harassment claims, which were not analyzed by the trial court. 329 F. Supp. 2d at 234.[13]

Likewise, in *Morales v. Santiago-Díaz*, 338 F. Supp. 2d 283, 295-296 (D.P.R. 2004), involving the same Defendants as here, another District Court Judge (Chief District Judge Fusté) made reference to the Comptroller's Audit Report and the OCALARH letter, granting Defendant's Summary Judgment motion. It is hard to understand the rationale behind the trial court's ruling in the instant case when in the above-discussed cases it not only ruled to the contrary but, in addition, relied heavily on the same documentary evidence that it excluded here.

The appellate court correctly determined that the court's attempt to be fair to all parties was not enough to render its exclusions insignificant. (Petitioner's App. A at 21a). The trial court's statements to the jury failed to put the jury on notice of the complete content of the excluded documents. (Petitioner's App. A at 21a-23a). The summaries by the trial court "were insufficient to convey the seriousness with which the Commonwealth had insisted that the defendants remedy the previous administration's abuses" (*i.e.*, illegal appointment and compensations). (Petitioner's App. A at 23a).

III. Considerations Governing Review on Certiorari

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari

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[13] *See* Petitioner's App. A at 25a-26a for the appellate court's analysis of the *Aldarondo-Lugo* case as it pertains to the present one. *See also* Santiago and Delgado's Supplemental Brief on Remand at 20-21.

will be granted only for compelling reasons." Rule 10 of the Rules of the Supreme Court of the United States. There are no compelling reasons to grant the present petition as prescribed by the Rules. *See id.* Nowhere in the petition for writ of certiorari does the petitioner affirm the character of the reasons indicated in Rule 10 of this Honorable Court. *See id.* For example, the petition fails to present this Honorable Court with a compelling conflict between decisions of the Circuit Courts or a compelling federal question of any nature. It merely adduces that the First Circuit may have erred in the application of clearly-established law. Even if Petitioner were correct in contending that the Court of Appeals applied the law incorrectly, there would be no good reason to grant her petition. But there is even less reason here because, as argued above, the Court of Appeals did not, in fact, err – to the contrary, its judgment was plainly justified.

In sum, the instant petition for writ of certiorari should be denied for the following reasons: the decision below gave full consideration to the issues and decided them correctly; the issues raised by petitioner are not sufficiently important to warrant this Court's attention because there is no circuit split and the issue raised lacks overall national importance; and the petition is void of any substantial question of law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted in San Juan, Puerto Rico, this 20th day of December 2006.

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